



**The Niue Treaty, and Its Operational and  
Legal Requirements**

(Prepared for the Micronesian Maritime  
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The views of expressed in this paper are those of the Author and do not necessarily reflect  
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## The Niue Treaty and Its Operational and Legal requirements

### Introduction

This paper has been prepared by the Forum Fisheries Agency for the Micronesia Maritime Surveillance Cooperation Conference. It contains an historical background to the development of the Treaty, a brief outline of the provisions and a detailed discussion of the legal and operational requirements. A copy of the text of the Treaty itself is annexed as **Attachment A** to this paper.

### Historical Development of the Niue Treaty on Cooperation in Fisheries Surveillance and Law Enforcement in the South Pacific Region.

The 4th ICOD<sup>1</sup>/FFA Regional Fisheries Surveillance Meeting<sup>2</sup> at Rarotonga in October 1988 recommended that consideration be given to developing an agreement on reciprocal enforcement. Subsequently, the 21st South Pacific Forum<sup>3</sup> meeting in Tarawa in 1989 reviewed the urgent need for closer cooperation among all Forum members in order to protect and preserve their fisheries and directed the FFA<sup>4</sup> to investigate, promote and implement the design and development of an integrated programme of regional fisheries surveillance.

In the light of the directive by the South Pacific Forum the 5th Regional Fisheries Surveillance Meeting at Honiara in October 1989 drew up a framework for a Convention on Reciprocal/Joint Surveillance and Enforcement. This framework was referred to the FFC<sup>5</sup>18 meeting at Nauru in 1990. FFC18 endorsed the principles set out in the framework and directed the Secretariat to convene a small group of experts to continue development of the draft convention and to circulate a draft for consideration at the Forum Fisheries Sub-Committee Meeting at Noumea in October 1990.

Accordingly a mini-legal consultation was held at Honiara between 27-31 August 1990. The consultation, which comprised legal and surveillance officials, produced a draft Treaty and a model subsidiary agreement on cooperation in fisheries surveillance and enforcement. The report was presented to the Noumea meeting and the secretariat was asked to collate responses from countries and attempt to incorporate responses into a revised draft. It was accepted that final clearance for the agreement would be sought at the annual FFC in 1991 (FFC20) and that the decision of that meeting could be referred to the South Pacific Forum. In fact, owing to the lack of member responses and severe time constraints, the FFC20 meeting at Wellington in May 1991 did not consider the matter.

The matter was raised again at FFC21 meeting at Pohnpei in July 1991. FFC21 agreed that implementation of the Treaty was a matter of the utmost urgency, and directed the Secretariat to convene a special legal working group to consider outstanding issues. As a result a special legal working group, chaired by Tuvalu, met at Honiara in January 1992. The group made substantial revisions to the draft prepared by the 1990 mini-legal consultation and ended up with a text closely resembling the final form of the Treaty. The report of the special legal working group was referred to and approved by the 7th Regional Fisheries Surveillance Meeting at Port Vila in February 1992. Subsequently the draft was adopted by FFC22 at Niue in April 1992 at which time the title of the Treaty was amended to become the Niue Treaty. It was then submitted to the 23rd South Pacific Forum for signature. At the 23rd South Pacific Forum, held at Honiara on 9 July 1992, the Niue Treaty was signed by the Heads of Government of Australia, Cook Islands, Federated States of Micronesia, Marshall Islands, Nauru, New Zealand, Niue, Palau, Solomon Islands, Tonga, Tuvalu, Vanuatu and Samoa. Since then, all FFA member countries have signed the Treaty and 14 have ratified it. Palau is the latest member to ratify the Treaty. Table 1 contains the current status of ratification of the Treaty.

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<sup>1</sup> International Centre for Ocean Development – the official Canadian Government aid agency

<sup>2</sup> A regional meeting of senior fisheries surveillance officials of the FFA member countries

<sup>3</sup> A meeting of the Pacific Forum country Leaders – Prime Ministers, Presidents and Premiers

<sup>4</sup> FFA member countries – Australia, Cook Islands, Fiji, Federated States of Micronesia, Kiribati, Marshall Islands, Nauru, New Zealand, Niue, Palau, Papua New Guinea, Samoa, Solomon Islands, Tonga, Tuvalu and Vanuatu

<sup>5</sup> Forum Fisheries Committee – the meeting of the governing council of FFA which is made up of senior Foreign Affairs and Fisheries Officials from the member countries

## **An outline of the Treaty and its provisions**

### The Terms of the Treaty

The Treaty is based on general principles flowing from the United Nations Convention on the Law of the Sea - LOSC, particularly Article 73. The Treaty is a head agreement intended to provide flexible arrangements for cooperation. It defines the general principles upon which parties may enter into more detailed subsidiary agreements. The model subsidiary agreement which was finalized in a Legal Consultation in 1995, contains clauses facilitating closer cooperation in more concrete ways such as the physical sharing of surveillance and enforcement equipment and the empowerment of each other's officers to perform enforcement duties. These clauses are models only; the actual provisions are, of course, a matter for the parties to agree thereto.

### Preamble

The Preamble sets out the basic purposes of the Treaty and refers to the underlying principles of international law upon which the Treaty is based. After restating the general principle that coastal States have sovereign rights for the purposes of exploring and exploiting, conserving and managing the fisheries resources of the exclusive economic zone, special references are made to Article 73 of the LOSC and Article 5 of the Forum Fisheries Agency Convention 1979.

Article 73 of the LOSC deals with the right of coastal States to enforce their laws and regulations. It provides as follows -

### **Article 73**

#### *Enforcement of laws and regulations of the coastal State*

1. *The coastal State may, in the exercise of its sovereign rights to explore, exploit, conserve and manage the living resources in the exclusive economic zone, take such measures, including boarding, inspection, arrest and judicial proceedings, as may be necessary to ensure compliance with the laws and regulations adopted by it in conformity with this Convention.*
2. *Arrested vessels and their crews shall be promptly released upon the posting of reasonable bond or other security.*
3. *Coastal State penalties for violations of fisheries laws and regulations in the exclusive economic zone may not include imprisonment, in the absence of agreements to the contrary by the States concerned, or any form of corporal punishment.*
4. *In cases of arrest or detention of foreign vessels the coastal State shall promptly notify the flag State, through appropriate channels, of the action taken and of any penalties subsequently imposed.*

To understand Article 73 fully, it is necessary to refer also to Article 62 on utilisation of the living resources of the exclusive economic zone. Article 62 requires nationals of States fishing in the EEZ to comply with the conservation measures and with the other terms and conditions established in the laws and regulations of the coastal State. Article 62 goes on to detail the matters to which the laws and regulations of the coastal State may relate. These include, *inter alia*, licensing of fishermen, fishing vessels and equipment, regulating seasons and areas of fishing, the types, sizes and amounts of gear, specifying information required of fishing vessels, including catch and effort statistics and vessel position reports, the placing of observers, the size of fish and other species that may be caught and enforcement procedures.

Article 5 of the Forum Fisheries Agency Convention sets out the functions of the Forum Fisheries Committee. The Committee is the governing body of the Agency and its primary function is to provide detailed policy and administrative guidance and direction. Paragraph 2 of Article 5 provides as follows -

### **Article 5**

#### *Functions of the Committee*

2. *In particular the Committee shall promote intra-regional co-ordination and cooperation in the following fields:*

- (a) *harmonisation of policies with respect to fisheries management;*
- (b) *cooperation in respect of relations with distant water fishing countries;*
- (c) *cooperation in surveillance and enforcement;*
- (d) *cooperation in respect of onshore fish processing;*
- (e) *cooperation in marketing;*
- (f) *cooperation in respect of access to the 200 mile zones of other Parties.*

Finally, the Preamble restates the basic purposes of the Treaty which are **enforcement** and **deterrence**.

## Article I

The purpose of Article I is to define some of the fundamental terms used in the Treaty and in national legislation. The definitions are similar to those used in the regionally agreed minimum terms and conditions of access (MTCs). Most of them have already been incorporated into national legislation.

## Article II

Article II explains the relationship of the Niue Treaty with other Treaties between the Parties and introduces **the concept of Subsidiary Agreements**. This provision is necessary because some of the matters referred to in the Niue Treaty, such as the undertaking to comply with the regional register rules<sup>6</sup> and apply the harmonized minimum terms and conditions<sup>7</sup>, are already covered in other Treaties and legally binding agreements, including the Nauru Agreement Concerning Cooperation in the Management of Fisheries of Common Concern 1982 and agreements made at meetings of the Forum Fisheries Committee. Article II therefore provides that **rights and obligations under the Niue Treaty shall apply in addition to similar rights and obligations under other Treaties**.

Article II also provides that **Parties may enter into Subsidiary Agreements to expand upon rights and obligations** in the Treaty. In effect, **Subsidiary Agreements will be the mechanism for implementing the general provisions of the Treaty**. A discussion of the Pro-forma subsidiary agreement is included below.

## Article III

Article III sets out areas of **general cooperation** between the Parties. The Parties agree to cooperate in the enforcement of their fisheries laws and regulations and to cooperate in developing regionally agreed procedures for the conduct of fisheries surveillance and law enforcement. Most importantly, Article III provides that the Parties may agree on forms of assistance for the purpose of carrying out the general purposes of the Treaty.

## Article IV

As noted in connection with Article II, the Niue Treaty to some extent reiterates previously existing obligations. In this respect it can be seen as a consolidation of some of the more important developments in regional fisheries cooperation over the past ten years. Article IV restates these existing obligations in some detail. It provides that the Parties shall -

- \* *cooperate in the implementation of harmonised minimum terms and conditions of access;*

The MTCs as they are commonly known, were first introduced in 1982 as an initiative of the Parties to the Nauru Agreement. Many countries implemented the MTCs through national fisheries legislation or as terms and conditions of access agreements. The MTCs were revised recently and the revised harmonised MTCs were adopted by FFC33 and brought into effect in 1998. Some of the member countries have made substantial progress in including the MTCs in access agreements with distant water fishing nations. Some countries, including Tonga, have adopted the MTCs as part of their national fisheries legislation. A copy of the harmonised MTCs, as adopted by FFC, appears as **Attachment B** to this paper.

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<sup>6</sup> The Procedures for the Operation of the Regional Register of Foreign Fishing Vessels

<sup>7</sup> The Revised Harmonized Minimum Terms and Conditions for Foreign Fishing vessel access

- \* *ensure that no foreign fishing vessel shall be licenced for fishing unless it is in good standing on the regional register;*

The regional register is basically an enforcement tool. The general intention behind it is to shift some of the responsibility for ensuring compliance to the flag State or fishing association. The fundamental requirement of the register, which is administered by the Director of FFA, is that before any vessel may be licensed to fish in the region it must be in good standing on the regional register. Rules of procedure for the operation of the regional register are made by the Forum Fisheries Committee. The rules were substantially amended in 1992 (FFC 22) and vessels are now required to register annually.

- \* *ensure that foreign fishing vessels are, as a minimum, required to provide reports in accordance with the standard forms of reporting as set out in the MTCs;*

Such reports include catch reporting, zone entry and exit reporting and weekly position reporting while in zone. In practice, all countries in the region are applying these requirements. Some countries have far more stringent requirements, including daily position reporting in zone and mandatory port calls before fishing activity takes place;

- \* *ensure that foreign fishing vessels are required to be readily identifiable from the sea and the air by way of distinctive markings;*

As part of the revised MTCs, all FFA member countries have agreed to adopt the FAO Standard Specifications for the Marking and Identification of Fishing Vessels. These specifications, endorsed by the 18th Session of the FAO Committee on Fisheries in 1989 for adoption by States on a voluntary basis, are a standardised system for the identification of fishing vessels operating in waters of States other than the flag State. Relevant provisions of the specifications appear in the revised MTCs.

- \* *ensure that foreign fishing agreements require the flag State, or, where appropriate, the fishing association, to take responsibility for the compliance by its vessels with the terms of the agreement and applicable national laws.*

Flag State responsibility is one of the most important mechanisms for dealing with violations by licensed fishing vessels. Article 58 of LOSC requires that States shall comply with the laws and regulations adopted by the coastal State in accordance with the provisions of the Convention and the 1984 FAO World Conference on Fisheries and Development specifically endorsed the application of this principle to bilateral access agreements. Flag State responsibility has proved to be an effective enforcement mechanism where the flag State has a substantial degree of control over its fishing fleet, such as in the case of the United States or Japan. The concept is of less use where the flag State does not exercise strict control over its fishing fleet. Most importantly, **it is very difficult to apply flag State responsibility in the case of unlicensed fishing.**

#### Article V

Article V requires the Parties to provide to FFA, or to other Parties directly, information relevant to the purposes of the Treaty. This information may include:-

- the location and movement of foreign fishing vessels;
- foreign fishing vessel licensing;
- fisheries surveillance and law enforcement activities.

Clearly, this Article **envisages a free exchange of information between the Parties for the purposes of gathering the necessary intelligence to conduct effective surveillance operations.** Information relating to the regional register is already exchanged on a regular basis. The, MSCN ( a project that is now redundant) providing secure voice communications and data transmission links between FFA member countries, was an example of the practical development of Article V.

#### Articles VI - III

Articles VI - VIII contain the real substance of the Niue Treaty.

## Article VI

Article VI deals with cooperation in fisheries surveillance and law enforcement. The Article contains details of four principal areas in which cooperation may take place. These merit close examination. First, however, in order to better appreciate the significance of the Treaty provisions, it is useful to briefly review the rules of international law relating to boarding and inspection of vessels.

The basic proposition is that, on the high seas, the flag State has exclusive jurisdiction over its vessels. Certain exceptions to this principle have been developed and were codified in the Geneva Convention on the High Seas 1958 and recently in the LOSC. These relate specifically to matters such as slavery, piracy and drug trafficking. In addition, vessels may be stopped and inspected on the high seas in exercise of the right of hot pursuit. In certain circumstances the right of hot pursuit may continue into the EEZ of another country. Additional material on the rather complex doctrine of hot pursuit is included in **Attachment C**.

Before LOSC, the right of coastal States to stop and inspect fishing vessels was limited to the territorial sea and the extended fishery zone (i.e., within 3 miles and 12 miles respectively). Since LOSC, however, the situation has changed. **Article 73 of LOSC allows the coastal State, in exercise of its sovereign rights in the EEZ, to take measures to ensure compliance by foreign vessels in the EEZ with coastal States laws and regulations.** Such measures may include boarding, inspection, arrest and judicial proceedings. In this respect, Article 73 significantly extends the powers of coastal States.

**The coastal State has no right, except in exercise of the right of hot pursuit, to stop and inspect vessels in waters under the jurisdiction of another State.** Thus State A has no right to stop, search or arrest a vessel in State B's waters for a breach of State A's laws.

The purpose of the Treaty is therefore not to extend the boundaries of international law. Thus it will still not be possible, under the Treaty, for a country to enforce its own laws in the EEZ of another country. **The purpose of the Treaty is to enable countries in the region to make the best use of the available surveillance equipment by giving vessels and personnel of A the authority to enforce the laws of B.**

The EEZ is a zone of special maritime jurisdiction. Article VI(1) implies that the conditions and method of stopping and inspecting vessels in the EEZ may differ from those in the territorial sea or archipelagic waters. To an extent, this is true. The new law of the sea leaves open the practical issues of use of force and procedures for boarding and inspection at sea. It is suggested that these policy issues would need to be determined by the Parties and covered by the Subsidiary Agreement, though there are moves to develop a regional policy on use of force in boarding operations based on the provisions of UNIA. **The real purpose of Article VI(1) is to recognise and emphasise that, at international law, hot pursuit may not continue into the territorial sea and archipelagic waters of a third State.** Thus, even with a subsidiary agreement in place between State A and State B, it would not be possible for State B to pursue a foreign vessel from a point within State B's EEZ to a point within State A's territorial waters unless there is a specific provision in the Agreement allowing pursuit into the territorial sea.

### Arrested vessels and personnel

Article VI(2) provides for the general principles of handing over of an arrested vessel and personnel on board pursuant to a Subsidiary agreement. Paragraph (2) employs the common phrase "as soon as possible". The details of what constitutes "as soon as possible" is for the Parties to agree upon in an agreement.

### Sharing of personnel equipment

Article VI(3) provides that any two or more Parties may enter into a Subsidiary Agreement under which they would cooperate in the provision of personnel and the use of vessels, aircraft or other items of equipment for fisheries surveillance and law enforcement purposes. The provision is

deliberately broad. It means that two or more countries may agree, for example, to share the use of a patrol vessel or surveillance aircraft. **The precise terms upon which the sharing is to take place will be dealt with by the Subsidiary Agreement which may, of course, vary substantially from case to case.** It would, however, be feasible to reach an Agreement under which a State A patrol boat is operated in the exclusive economic zones of States B, C, D and E.

Whatever the circumstances, it is a requirement that a vessel or aircraft operating pursuant to the Treaty be marked according to **Annex 1**. This means, in the case of a vessel, that the regional surveillance flag must be flown in the approved manner or, in the case of an aircraft, that the aircraft be clearly marked in a manner agreeable to the Parties to the Subsidiary Agreement.

#### Cross-authorization of Officers (1)

While Article VI(3) introduces the general principle by which Parties may share surveillance assets, it does not address the vital issue of jurisdiction. This is particularly important where surface vessels are concerned. For purposes of enforcement, it is essential that officers on board the patrol boat have the necessary authorisation to perform enforcement functions in the exclusive economic zone of the other party to a Subsidiary Agreement.

Article VI, paragraphs 4 and 5 address this problem. Paragraph 4 provides that a Party may authorise its officers to perform fisheries surveillance and enforcement functions while on board a vessel or aircraft of another Party. Thus, State A could authorise its officers to carry out enforcement functions while on board State B's patrol boat while it is operating in the State A's EEZ.

Article VI(4) requires the authorisation to be in writing and the authorised personnel to be identified by means of a card in the form set out in **Annex 2** to the Treaty. The details of the authorisation may be dealt with in the Subsidiary Agreement, but will obviously need to be consistent with the relevant fisheries laws of the Parties.

#### Cross-authorisation of Officers (2)

Article VI(5) deals with the situation where A wishes to authorise the officers of B to perform fisheries surveillance and law enforcement functions on A's behalf while on board a vessel of B. This would cover the situation where, for example, Palau wishes to give full authority to FSM to conduct surveillance patrols in Palau's EEZ using a FSM crew on board a FSM patrol boat.

As in the case of Article VI(4), an instrument in writing is required and the officers concerned must be identified by means of an identification card.

#### Extension of surveillance and enforcement activities into the territorial sea and archipelagic waters of another Party

Paragraphs (3) to (5) of Article VI cover the situation where surveillance and enforcement activity takes place within the EEZ. Under Article VI(1) a Party may, by way of provisions in a Subsidiary Agreement or otherwise, permit another Party to extend its fisheries surveillance and law enforcement activities to the territorial sea or archipelagic waters of that Party. In such circumstances, the conditions and method of stopping, inspecting, detaining, directing to port and seizing vessels shall be governed by the national laws and regulations applicable in the State in whose territorial sea or archipelagic waters the fisheries surveillance or law enforcement activity was carried out. In addition, under paragraph (2), vessels seized by a Party pursuant to an agreement under paragraph (1) must be handed over as soon as possible to the authorities of the coastal State.

### **Article VII**

Article VII deals with cooperation in prosecutions. It sets out three ways in which Parties may cooperate.

#### Extradition

Extradition is one of the traditional "long-arm" enforcement processes. It is normally exercised pursuant to a bilateral extradition treaty. In fact, because of the practical and legal difficulties associated with extradition, the provisions of the Niue Treaty do not add significantly to the existing

law. There is an existing extradition scheme already in force among Commonwealth countries that is based upon reciprocal legislative arrangements. The difficulty with this scheme is that it does not, at present, apply to fisheries offences and, bearing in mind that Article 73 of UNCLOS does not allow imprisonment for fisheries offences, it would be difficult for many FFA member countries to amend their legislation to make fisheries offences extraditable. For these reasons, and following the recommendation of the special legal working group convened to prepare the final draft of the Treaty, **Article VII(1) is not binding upon the Parties.**

#### Request for Assistance

In order to overcome the juridical difficulties associated with extradition, Article VII(2) enables a Party to request another Party which is holding a person or vessel in custody for an offence against the laws of the holding Party to assist the requesting Party to enforce its fisheries laws in respect of that person or vessel. Such assistance is to be provided upon completion of the legal processes of the holding Party and to the extent permitted by its national laws and regulations.

This is clearly a highly flexible provisions which, once the Treaty comes into force, can be used on *ad hoc* basis. There is no need for a Subsidiary Agreement to be in force before a Party can rely on Article VII(2). Once a request is made, the holding Party is bound to provide assistance to the extent permitted by its national laws and regulations.

#### Judicial Proceedings

Paragraph 3 of Article VII would enable Parties, by means of Subsidiary Agreements or other legal devices, to develop procedures whereby persons permitted to appear as advocates or expert witnesses in the courts of one Party are, for the purposes of judicial proceedings involving offences against fisheries laws, entitled to perform the same or substantially similar functions in the courts of another Party. For example, let us assume that Vanuatu had entered into such an agreement with New Zealand. If there were court proceedings of a fisheries related nature in New Zealand in which Vanuatu had an interest (for example, the vessel concerned may be wanted by Vanuatu for another offence and a request for assistance has been made under Article VII(2)) it could be made possible for an advocate from Vanuatu to appear in the court in New Zealand for the purposes of those proceedings only.

It remains to be seen how this provision will be applied in practice. It is possible that the role to be played by advocates of another country would be limited to representing their Government in proceedings in which their Government has an interest in the outcome. How this could be achieved would clearly depend to a large extent upon the judicial system in each country. It is possible to envisage a mechanism whereby advocates could be allowed to appear as *amicus curiae* or with a noting brief; not to prosecute cases in foreign courts.

As with many other provisions in the Treaty, this provision is permissive and requires more precise elucidation through Subsidiary Agreements. It may also, in some cases, conflict with local rules and procedures relating to the admission of legal practitioners. Such conflicts can only be resolved through the Subsidiary Agreements and by agreement between the countries concerned.

#### **Article VIII**

This Article enables Parties to agree on procedures whereby a penalty imposed by one Party under its fisheries laws may be enforced by another Party. This could be used, for example, in the following scenarios

- A.** Where a vessel is apprehended and the owner, master or charterer fined according to the laws of Party A. Before settlement of the fines, the accused flees the jurisdiction. If a Subsidiary Agreement implementing Article VIII is in effect, the judgment may be enforced in Party B.
- B.** Where the laws of Party A provide for administrative penalties to be imposed where there has been a breach of fisheries laws and it has been impossible to apprehend

the offender. If a Subsidiary Agreement implementing Article VIII is in effect, the penalty may be enforced against the offender in Party B.

It must be noted that constitutional provisions relating to the trial of criminal proceedings in many FFA member countries would make it impossible to make use of this provision in the Treaty. Even where the introduction of such a procedure is constitutionally possible, implementing legislation may be necessary.

### **Articles IX - XIV; Formal Parts**

The remaining Articles are largely self-explanatory. Under Article XI the depository for the Treaty shall be the Government of Niue. The Treaty is open for signature by all members of the South Pacific Forum Fisheries Agency (FFA) and territories of members of FFA which have been authorised to sign (this applies only to Tokelau at present). The Treaty enters into force upon the deposit of the fourth instrument of ratification.

The Treaty entered into force on 20 May 1993 upon the deposit by Tonga of the fourth instrument of ratification.

### **The Legal and Operations Requirements**

The legal obligations of the Parties to the Niue Treaty are spread throughout the document. However, the major obligations will be highlighted in this discussion.

The first obligation is “cooperation in the enforcement of their fisheries laws and regulation” [Art. III(1)]. This is a requirement that Parties are to cooperate in the enforcement of their domestic laws.

Secondly, the Parties are also required to cooperate to develop regionally agreed procedures for the conduct of fisheries surveillance and law enforcement. This places on the Parties the obligation to work together cooperatively in developing procedures for fisheries surveillance. This general foundation of the Treaty is based on these requirements to cooperate once you become a Party to the Treaty.

Article IV then stipulates specific obligations on the Parties; such as the implementation of the revised harmonized MTCs, non-registration of an FFV on the Regional Register would prevent the issue of a licence or permit and others.

Another important obligation that the Parties must comply with is the exchange of information (Art. V). This obligation puts the onus on the Parties to provide the required information pursuant to what is permissible under their laws domestic laws. The exchange of information is not limited to the matters listed in paragraph 1.

The Parties are also required to develop standard forms and procedures for reporting information provided under paragraph 1 and also effective methods of communication amongst themselves in passing over the information.

For operational requirements, Article VI provides the most important guidelines in cases where the Parties are contemplating a shared patrol. The implementation of the provisions of the Treaty is based on the Subsidiary Agreement. The Subsidiary Agreement is the vehicle where 2 or more Parties can work out the details as to the patrol. This can be referred to as the “nuts and bolts” of the Treaty.

However, some of the legal and operational requirements of the Treaty can be inseparable. The requirement of vessel or aircraft identification is stipulated under Article VI(3) where the vessel or aircraft must be identified as set out in **Annex 1**.

Paragraph 4 provides that a Party may authorise its officers to perform fisheries surveillance and enforcement functions while on board a vessel or aircraft of another Party. Thus, State A could authorise its officers to carry out enforcement functions while on board State B’s patrol boat while it is operating in the State A’s EEZ.

It requires the authorisation to be in writing and the authorised personnel to be identified by means of a card in the form set out in **Annex 2** to the Treaty. The details of the authorisation may be dealt with

in the Subsidiary Agreement, but will obviously need to be consistent with the relevant fisheries laws of the Parties.

Paragraph (5) deals with the situation where A wishes to authorise the officers of B to perform fisheries surveillance and law enforcement functions on A's behalf while on board a vessel of B. This would cover the situation where, for example, Palau wishes to give full authority to FSM to conduct surveillance patrols in Palau's EEZ using a FSM crew on board a FSM patrol boat.

As in the case of paragraph (4), an instrument in writing is required and the officers concerned must be identified by means of an identification card.

### **The Subsidiary Agreement**

The Pro-forma-Subsidiary Agreement was developed by a Working Group of lawyers and surveillance officials in 1995. The primary purpose of the Pro-forma Subsidiary agreement is to assist member countries in their negotiations. The Pro-forma Agreement is accompanied by a set of "Notes for Guidance" and is included in this paper as Attachment D.

The Pro-forma is designed to provide guidance and direction to the negotiating Parties and it is subject to the approval and adoption by the legal advisers of each Party. It is meant as a starting point and Parties may add or delete suggested provisions in the Pro-forma. The final version of a Subsidiary Agreement will depend entirely on the wishes of the Parties as to what they agreed to in their negotiations.

If the Parties prefer to use the Pro-forma Agreement, then the "Notes for Guidance" should be consulted as to what is required by the Articles of the Agreement. The "Notes" were also produced by the Legal Consultation as a means of assistance in fulfilling the provisions.

The Pro-forma is looked upon as the mechanism for detailed provisions such as authorisation of officers, use of assets, costs and provisions, indemnity, investigations, dispute settlement, termination and others as matters that would require the Parties to agree to be part of the Agreement.

The Pro-forma attempts to identify all the relevant factors in conducting a fisheries patrol that would require mutual agreement of the Parties. Such issues as the parameters of the patrolled area would also require agreement and the time frame of the patrol. It is important to note that the patrol will start and end at some point in the future and those points are required to be identified. The extent of the area needs to be defined with some clarity and certainty. If this is not properly dealt with, then it is possible that it can cause confusion and the success or failure of prosecuting a violation could depend on the accuracy of the definition of the area to be patrolled.

Finally, the Pro-forma is only a suggested formula and Parties are not obligated to use it. Parties can draw up their own Agreement that fulfills the Subsidiary agreement requirement under Treaty. As mentioned earlier, it is an effort by the Secretariat to assist Parties to negotiate agreements to facilitate the sharing of surveillance agreements.

### **Conclusion**

The Niue Treaty has been under-utilized by the Parties. The Parties have not called for a meeting as provided in Article IX. With increasing MCS activities being required of the member countries in the fulfillment of their international law obligations under the Law of the Sea Convention, the activities and duties of surveillance officials and equipment will be called upon to undertake shared operations and patrols in their exclusive economic zones. It is recognized that MCS operations are expensive, however if these are not undertaken then the depletion, over-fishing and uncontrolled harvesting of marine resources would cost FFA member countries more in lost revenue and lost of resources for the benefit of future generations.

Table 1 shows the current status of the Treaty.

Current Status of implementation as at 24 February 1999. *(Information supplied by the Govt. of Niue).*

	<b>Date of Signature</b>	<b>Date of Ratification</b>
Australia	9-July-92	3-Sept-93
Cook Islands	9-July-92	3-Mar-93
Federated States of Micronesia	9-July-92	3 Dec- 3
Fiji	11-Aug-93	5 Mar 96
Kiribati	11-May-93	30 Oct 94
Marshall Islands	9-July-92	10 Jan 95
Nauru	9-July-92	30 Sept 92
New Zealand	9-July-92	
Niue	9-July-92	9 Mar 93
Palau	9-July-92	Date to be advised by Niue Government
Papua New Guinea	11-May-93	12 Nov 94
Samoa	9-July-92	
Solomon Islands	9-July-92	27 May 94
Tokelau	11-May-93	
Tonga	9-July-92	20-May-93
Tuvalu	9-July-92	
Vanuatu	9-July-92	10-Nov-93

Attachment A

NIUE TREATY ON COOPERATION IN FISHERIES SURVEILLANCE  
AND LAW ENFORCEMENT IN THE SOUTH PACIFIC REGION

The Parties to this Treaty:

**GIVEN** that in accordance with international law as expressed in the United Nations Convention on the Law of the Sea, coastal States have sovereign rights for the purposes of exploring and exploiting, conserving and managing the fisheries resources of their exclusive economic zones and fisheries zones;

**TAKING INTO ACCOUNT** Article 73 of the United Nations Convention on the Law of the Sea;

**NOTING** that the Parties to the South Pacific Forum Fisheries Agency Convention, 1979 have agreed under Article 5 of that Convention that the Forum Fisheries Committee shall promote intra-regional coordination and cooperation in fisheries surveillance and law enforcement;

**CONSIDERING** the vast areas of ocean covered by the exclusive economic zones and fisheries zones of coastal States in the South Pacific region and the vital economic significance of such zones to the economic development of South Pacific coastal States;

**WISHING THEREFORE** to enhance their ability to enforce effectively their fisheries laws, and deter breaches of such laws;

**HAVE AGREED AS FOLLOWS:**

**ARTICLE I - DEFINITIONS**

In this Treaty:

- (a) 'fishing' means:
  - (i) searching for, catching, taking or harvesting fish;
  - (ii) attempting to search for, catch, take or harvest fish;
  - (iii) engaging in any other activity which can reasonably be expected to result in the locating, catching, taking or harvesting of fish;
  - (iv) placing, searching for or recovering fish aggregating devices or associated electronic equipment such as radio beacons;
  - (v) any operations at sea directly in support of, or in preparation for any activity described in this paragraph;
  - (vi) use of any craft, air or sea borne, for any activity described in this paragraph except for emergencies involving the health and safety of the crew or the safety of a vessel;
  - (vii) the processing, carrying or transshipping of fish that have been taken.
- (b) 'fishing vessel' means any boat, ship or other craft which is used for, equipped to be used for, or of a type normally used for fishing;
- (c) 'foreign fishing agreement' means an agreement or arrangement authorizing or permitting foreign fishing vessels to fish in the exclusive economic zone or fisheries zone of any Party;
- (d) 'foreign fishing vessel' in relation to a Party means a fishing vessel which is not part of the domestic fleet of that Party;
- (e) 'South Pacific Forum Fisheries Agency' means the Agency of that name established by the South Pacific Forum Fisheries Agency Convention, 1979; and

- (f) 'Subsidiary Agreement' means an agreement or an arrangement entered into by any two or more Parties in accordance with this Treaty.

## **ARTICLE II - RELATIONSHIP WITH OTHER TREATIES**

1. Rights and obligations under this Treaty shall apply as between the Parties in addition to any right or obligation concerning a similar matter applicable to a Party under any other Treaty.

2. A Subsidiary Agreement may expand upon rights and obligations under this Treaty in their application between the Parties to the Subsidiary Agreement.

## **ARTICLE III - GENERAL COOPERATION**

1. The Parties shall cooperate in the enforcement of their fisheries laws and regulations in accordance with this Treaty and may agree on forms of assistance for that purpose.

2. The Parties shall cooperate to develop regionally agreed procedures for the conduct of fisheries surveillance and law enforcement. Where appropriate, fisheries surveillance and law enforcement will be conducted in accordance with such regionally agreed procedures.

## **ARTICLE IV - COOPERATION IN THE IMPLEMENTATION OF HARMONIZED MINIMUM TERMS AND CONDITIONS OF FISHERIES ACCESS**

1. The Parties shall cooperate in the implementation of harmonized minimum terms and conditions of fisheries access as may be agreed upon from time to time.

2. The Parties shall ensure that no foreign fishing vessel shall be licensed for fishing unless the vessel has good standing on the Regional Register of Foreign Fishing Vessels maintained by the South Pacific Forum Fisheries Agency.

3. The Parties shall ensure that foreign fishing vessels licensed to fish under foreign fishing agreements are, as a minimum, required to provide reports in accordance with the standard forms of reporting as set out in the harmonised minimum terms and conditions of fisheries access from time to time.

4. The Parties shall ensure that fishing vessels licensed to fish under foreign fishing agreements are required to be readily identifiable from the sea and the air by way of distinctive markings.

5. The Parties shall, as far as possible, ensure that foreign fishing agreements with flag States require the flag State to take responsibility for the compliance by its flag vessels with the terms of any such agreement and applicable laws.

6. The Parties shall, as far as possible, ensure that foreign fishing arrangements with foreign parties, including Fishing Associations, require the foreign party to take responsibility for the compliance by its vessels with the terms of any such arrangement and applicable laws.

## **ARTICLE V - EXCHANGE OF INFORMATION**

1. Each Party shall, to the extent permitted by its national laws and regulations, provide to the South Pacific Forum Fisheries Agency, or to any other Party directly, information relevant to the purposes of this Treaty, including but not limited to information about:

- (a) the location and movement of foreign fishing vessels;
- (b) foreign fishing vessel licensing; and
- (c) fisheries surveillance and law enforcement activities.

2. The Parties shall develop standard forms and procedures for reporting information provided under paragraph 1 of this Article and effective methods for communicating such information.

## **ARTICLE VI - COOPERATION IN FISHERIES SURVEILLANCE AND LAW ENFORCEMENT**

1. A Party may, by way of provisions in a Subsidiary Agreement or otherwise, permit another Party to extend its fisheries surveillance and law enforcement activities to the territorial sea and archipelagic

waters of that Party. In such circumstances, the conditions and method of stopping, inspecting, detaining, directing to port and seizing vessels shall be governed by the national laws and regulations applicable in the State in whose territorial sea or archipelagic waters the fisheries surveillance or law enforcement activity was carried out.

2. Vessels seized by another Party pursuant to an agreement under paragraph 1 of this Article in the territorial sea or archipelagic waters of a Party shall, together with the persons on board, be handed over as soon as possible to the authorities of that Party.

3. Any two or more Parties may enter into a Subsidiary Agreement under which they would cooperate in the provision of personnel and the use of vessels, aircraft or other items of equipment for fisheries surveillance and law enforcement purposes. Vessels and aircraft shall be identified as set out in Annex 1.

4. Any Party wishing to authorize its officers to perform fisheries surveillance and law enforcement functions on its behalf while on board a vessel or aircraft of another Party shall by instrument in writing designate the officers accordingly and such officers shall be identified as set out in Annex 2.

5. Any Party wishing to authorise the officers of another Party to perform fisheries surveillance and law enforcement functions on its behalf while on board a vessel of that other Party shall by instrument in writing designate such officers accordingly. Officers carrying out enforcement functions shall be identified by a card in the form set out in Annex 2 with such variations as may be agreed to in a Subsidiary Agreement or otherwise.

#### **ARTICLE VII - COOPERATION IN PROSECUTIONS**

1. The Parties may, by way of provisions in a Subsidiary Agreement or otherwise, agree on procedures for the extradition to a Party of persons charged with offences against the fisheries laws of that Party.

2. A Party may request another Party which is holding a person or any equipment (including a vessel) in custody for an offence against the laws of the holding Party to assist the requesting Party to enforce its fisheries laws in respect of that person or equipment. The holding Party shall provide such assistance upon completion of its legal processes and to the extent permitted by its national laws and regulations. Such assistance shall be provided on such conditions as to cost recovery or other matters as the Parties agree in each case.

3. The Parties may agree on procedures whereby persons permitted to appear as advocates or expert witnesses in the courts of one Party are, for the purposes of judicial proceedings involving offences against fisheries laws, entitled to perform the same or substantially similar functions in the courts of another Party.

4. Where there are waters over which more than one Party claims to have jurisdiction for the purposes of the application of fisheries laws, the Parties concerned shall for the purposes of the application of this Agreement seek to adopt the provisional lines used for the distribution of revenue received under the Treaty on Fisheries between the Governments of Certain Pacific Island States and the Government of the United States of America done at Port Moresby on 2 April 1987.

#### **ARTICLE VIII - COOPERATION IN ENFORCEMENT OF PENALTIES**

Should two or more Parties wish to provide that a penalty imposed by one Party under its fisheries laws be enforced by another Party, they may, by way of provisions in a Subsidiary Agreement or otherwise, agree on procedures for that purpose consistent with their national laws.

#### **ARTICLE IX - CONSULTATIONS**

The Director of the South Pacific Forum Fisheries Agency, at the request of any three or more Parties, shall convene a meeting to discuss any matter arising out of the application of this Treaty. The meeting shall be held at such time and place as the Parties may agree, but shall be held not more than 90 days after the request is notified to the Director.

## **ARTICLE X - NOTIFICATION**

1. Each Party shall notify the Director of the South Pacific Forum Fisheries Agency of the current postal, cable, telex and facsimile addresses which it wishes to be used for the receipt of notices given pursuant to this Treaty, and of any changes to a notified address. The Director of the South Pacific Forum Fisheries Agency shall inform all Parties of the notified addresses.

2. Any notice given under this Treaty shall be in writing and may be served by hand, post, cable, telex or facsimile to the notified address.

## **ARTICLE XI - DEPOSITARY**

The depositary for this Treaty shall be the Government of Niue.

## **ARTICLE XII - AMENDMENTS**

1. Any Party may propose to the depositary an amendment to this Treaty, which shall be considered by the Parties at a meeting arranged in accordance with Article IX.

2. The text of any amendments shall be adopted by unanimous decision of the Parties to the Treaty.

3. Any amendment to this Treaty which is adopted by the Parties shall enter into force upon the receipt by the depositary of the instruments of ratification, acceptance or approval by all of the Parties, or on such later date as may be specified in the amendment.

4. The depositary shall notify all of the Parties of the entry into force of an amendment.

## **ARTICLE XIII - FINAL CLAUSES**

1. This Treaty shall be open for signature by:

- (a) any member of the South Pacific Forum Fisheries Agency;
- (b) any Territory of a Member of the South Pacific Forum Fisheries Agency which has been authorized to sign the Treaty and to assume rights and obligations under it by the Government of the State which is internationally responsible for it.

2. This Treaty is subject to ratification by members of the South Pacific Forum Fisheries Agency and the Territories referred to in paragraph I of this Article. The instruments of ratification shall be deposited with the depositary.

3. This Treaty shall enter into force on the date of deposit of the fourth instrument of ratification.

4. This Treaty shall remain open for accession by the members of the South Pacific Forum Fisheries Agency and the Territories referred to in paragraph I of this Article. The instruments of accession shall be deposited with the depositary.

5. If all of the Parties agree, a State which is not a Party to the South Pacific Forum Fisheries Agency Convention may accede to this Treaty.

6. For any member of the South Pacific Forum Fisheries Agency or a State or Territory which ratifies or accedes to the Treaty after the date of deposit of the fourth instrument of ratification, the Treaty shall enter into force on the date of deposit of its instrument of ratification or accession.

## **ARTICLE XIV - CERTIFICATION AND REGISTRATION**

1. The original of the Treaty shall be deposited with the depositary, which shall transmit certified copies to all States and Territories eligible to become party to this Treaty.

2. The depositary shall register this Treaty in accordance with Article 102 of the Charter of the United Nations.

**IN WITNESS WHEREOF** the undersigned, being duly authorised by their respective Governments, have signed this Treaty.

**OPENED FOR SIGNATURE** at Honiara, Solomon Islands on the ninth day of July, One thousand nine hundred and ninety two.

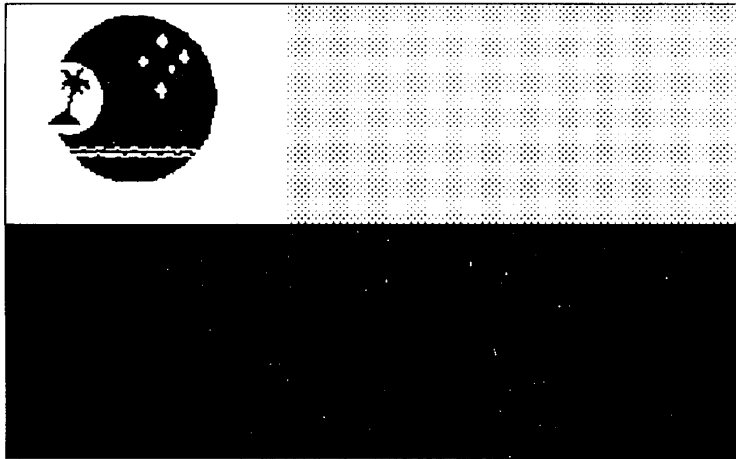
**REPRESENTATIVES OF:**

Australia	Niue
Cook Islands	Palau
Federated States of Micronesia	Papua New Guinea
Fiji	Solomon Islands
Kiribati	Tonga
Marshall Islands	Tuvalu
Nauru	Vanuatu
New Zealand	Western Samoa

ANNEX 1

**FISHERIES SURVEILLANCE AND LAW ENFORCEMENT  
FLAG AND MARKINGS**

Regional Fisheries Surveillance and Law Enforcement Flag:



[ Colours: Bottom half, dark blue. Upper half, light blue. Forum Logo on a white background.]


The Regional Fisheries Surveillance and Law Enforcement Flag is authorised for use by vessels during surveillance patrols. It should be flown at the same times as the national or ensign flag with the national or ensign flag superior.

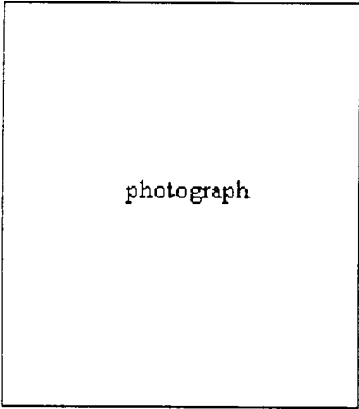
**Aircraft Markings:**

Aircraft shall be clearly marked and identifiable in a manner agreed between the Parties to subsidiary agreements.

ANNEX 2

IDENTIFICATION CARD

	<p><b>TREATY ON COOPERATION IN FISHERIES SURVEILLANCE AND LAW ENFORCEMENT IN THE SOUTH PACIFIC REGION</b></p> <p>THE HOLDER OF THIS CARD IS AUTHORISED TO ENFORCE THE FISHERIES LAWS OF THE COUNTRIES LISTED BELOW WHILE ON BOARD THIS CRAFT.</p>
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NAME OF HOLDER: _____	
SIGNATURE: _____	
ISSUED BY: _____ (Name of issuing officer)	
SIGNATURE: _____	
DATE: _____	
THIS AUTHORISATION IS VALID UNTIL: _____	



**THE HARMONISED MINIMUM TERMS AND CONDITIONS FOR FOREIGN  
FISHING VESSEL ACCESS**

**As amended by FFC34  
(24-28 November 1997)**

1. These Definitions shall apply to these Harmonised Minimum Terms and Conditions and to the South Pacific Forum Fisheries Agency Regional Register of Foreign Fishing Vessels and are recommended to member countries for implementation in national legislation.

**(a) “Automatic Location Communicator”(ALC) means a Forum Fisheries Agency (FFA) approved device placed on a fishing vessel that transmits either in conjunction with another device or devices or independently information concerning the position, fishing and such other activities of the vessel as may be required.**

**(b) “Vessel Monitoring System” means the systems employed by FFA member countries and coordinated by the FFA to monitor the position and activities of foreign fishing vessels for the purpose of effective management of fisheries.**

- (c) "fishing" means:
- (i) searching for, catching, taking or harvesting fish;
  - (ii) attempting to search for, catch, take or harvest fish;
  - (iii) engaging in any other activity which can reasonably be expected to result in the locating, catching, taking or harvesting of fish;
  - (iv) placing, searching for or recovering fish aggregating devices or associated electronic equipment such as radio beacons;
  - (v) any operations at sea directly in support of or in preparation for any activity described in sub-paragraphs (i) to (iv);
  - (vi) use of any other vehicle, air or sea borne, for any activity described in sub-paragraphs (i) to (v) except for emergencies involving the health and safety of the crew or the safety of a vessel.
- (d) "Foreign Fishing Vessel" or "vessel" means any tuna fishing or tuna fishing support vessel which operates in the exclusive economic or fisheries zone of a member country and is not part of the domestic fleet of the country in whose zone the operation occurs.
- (e) "Licence Form" means the common regional licence form contained in Annex 1 which shall be used for all foreign fishing vessels.
- (f) "Licensing country" or "member country" means a party to the South Pacific Forum Fisheries Agency Convention, 1979.
- (g) "Operator" means any person who is in charge of, directs or controls a vessel, including the owner, charterer and master.
- (h) "Transshipment" means the removal of any or all of the fish on board a licensed foreign fishing vessel either ashore or onto another vessel.

- (i) "Zone" means the exclusive economic zone or fisheries zone of a member country of the South Pacific Forum Fisheries Agency.

## **2. Common Regional Licence Form**

Foreign fishing vessels shall not fish in the zone of any member country unless licensed to fish in the form contained in Annex 1 and such licence or a duly certified copy, facsimile or telex confirmation thereof shall be carried on board at all times.

## **3. Control and Monitoring of Transshipment**

- (a) A fishing trip shall be deemed to have ended at such time as any or all of the fish on board the vessel are removed from the vessel, either ashore or onto another vessel except for the transfer of catch by a licensed group seiner to its licensed carrier vessel.
- (b) The operator of a foreign fishing vessel shall:
  - (i) not tranship at sea under any circumstances except for the transfer of catch by a licensed group seiner to its licensed carrier vessel which is in good standing on the Regional Register;
  - (ii) provide 72 hours notice to a licensing country of a request to transship any or all of the fish on board and shall provide the name of the vessel, its international radio call sign, its position, the catch on board by species, the time and port where such transshipment is requested to occur, and an undertaking to pay all fees required under the laws of the licensing country;
  - (iii) only transship at the time and port authorised for transshipment by the licensing country;
  - (iv) submit full reports on transshipping on the prescribed forms;
  - (v) allow and assist any person identified as an officer of the licensing country full access to and use of facilities and equipment which the officer may determine is necessary to carry out his or her duties; have full access to the bridge, fish on board and areas which may be used to hold, process, weigh and store fish; remove samples; have full access to the vessel's records, including its log and documentation for the purpose of inspection and photocopying; and gather any other information required to fully monitor the activity;
  - (vi) shall not assault, obstruct, resist, delay, refuse boarding to, intimidate or interfere with any such officer in the performance of his or her duties; and
  - (vii) shall pay all fees required under the laws of the licensing country.

## **4. Maintenance and Submission of Catch Logs in Zones and on High Seas**

The operator shall:

- (a) duly complete in the English Language, daily reports on the prescribed forms of all catch in the zone of any licensing country and on the high seas and shall certify that such information is true, complete and accurate.
- (b) provide to the licensing country or its representative on the prescribed forms
  - (i) a preliminary report within 14 days of the completion of a trip; and
  - (ii) a final report within 45 days of the completion of a trip.

## **5. Vessel Reporting Requirements**

The operator of a foreign fishing vessel shall provide to the licensing country or its representative information relating to the position of, and catch on board, the vessel, as

described in Annex 2 in the manner notified by a licensing country as follows:

- (a) each Wednesday;
- (b) within a reasonable time of entry into and departure from the zone of any licensing country as determined by the licensing country; and
- (c) within a reasonable time prior to the estimated time of entry into any port of a licensing country as determined by the licensing country.

**6. Observers**

- (a) The operator and each member of the crew of a vessel shall allow and assist any person identified by a country as an observer to:
  - (i) board the vessel for scientific, compliance, monitoring and other functions;
  - (ii) embark at a place and time agreed to;
  - (iii) have full access to and use of all facilities and equipment on board which the observer may determine is necessary to carry out his or her duties, including:
    - ◆ full access to the bridge, fish on board, and areas which may be used to hold, process, weigh and store fish;
    - ◆ remove samples;
    - ◆ full access to the vessel's records including its logs and documentation for the purpose of records inspection and copying;
    - ◆ reasonable access to navigation equipment, charts, and radios;
    - ◆ other information relating to fishing;
  - (iv) disembark at an agreed place and time; and
  - (v) carry out all duties safely.
- (b) The operator or any crew member of the vessel shall not assault, obstruct, resist, delay, refuse boarding to, intimidate or interfere with an observer in the performance of his or her duties.
- (c) The operator shall provide the observer, while on board the vessel, at no expense to the licensing country, with officer level accommodation, food and medical facilities.
- (d) The following costs of the observer shall be met by the operator:
  - (i) full travel costs from the licensing country to and from the vessel;
  - (ii) salary; and
  - (iii) full insurance coverage for the observer.

**7. Appointment of an agent**

- (a) The flag state government and/or fishermen's association and/or vessel operator shall nominate, appoint and maintain an agent who shall be resident in a licensing country and who shall have authority to receive and respond to any legal process and shall notify the licensing country of the name and address of such agent.
- (b) Any communication, information, document, direction, request or response to or from that agent shall be deemed to have been sent to, or received from the (flag state government and/or fishermen's association and/or) vessel operator.

**8. Foreign Fishing Vessels in Transit**

Foreign fishing vessels navigating through ("transiting") the fisheries zone shall be required to have all fishing equipment on board stowed or secured in such a manner that it is not readily

available to use for fishing.

**9. Enforcement**

- (a) a vessel operator and each member of the crew shall, while in any zone of a member country, immediately comply with every instruction and direction given by an authorised and identified officer including to stop, move to a specified location and to facilitate safe boarding and inspection of the vessel, its licence, gear, equipment, records, facilities, fish and fish products;
- (b) the vessel operator and each member of the crew shall facilitate and assist in any action by an authorised officer of a country and shall not assault, obstruct, resist, delay, refuse boarding to, intimidate or interfere with an authorised officer in the performance of his or her duties;
- (c) an authorised officer shall conduct each boarding and inspection as much as possible in a manner so as not to interfere unduly with the lawful operation of the vessel;
- (d) a vessel operator shall ensure the continuous monitoring of the international distress and calling frequency 2182 khz (HF), and the international safety and calling frequency 156.8 Mhz (channel 16, VHF-FM) to facilitate communication with the fisheries management, surveillance and enforcement authorities of a country;
- (e) a vessel operator shall ensure that a recent and up to date copy of the International Code of Signals (INTERCO) is on board and accessible at all times;
- (f) for fisheries surveillance and marine safety purposes, every vessel shall be marked and identified in accordance with the FAO approved Standard Specifications for the Marking and Identification of Fishing Vessels (ANNEX C).

**10. Flag State or Fishermen's Associations Responsibility**

Flag States or, in the absence of access arrangements with flag states, the appropriate Fishermen's Associations, be required in agreements to take measures to ensure compliance by their fishing vessels with coastal State laws.

**11. Vessel Monitoring System**

- (a) The vessel monitoring system shall be implemented by the operation of a VMS Register of Foreign Fishing Vessels as set out in ANNEX 4
- (b) The operator of a foreign fishing vessel shall apply for registration of the ALC on the prescribed form (ANNEXES 6 and 7) for each year and pay the prescribed fee; install and operate a registered ALC on board the vessel; and maintain the ALC in good working order.
- (c) The operator of a foreign fishing vessel shall not interfere with, tamper with, alter, damage or disable the ALC; move or remove the ALC from the agreed installed position without the prior permission of the licensing country; or impede the operation of the ALC.
- (d) At least [*to be determined by the licensing country*] hours prior to entry into the exclusive economic zone of [*insert name of the licensing country*] the operator of a foreign fishing vessel shall ensure that the ALC is switched on and is operating properly at all times when the vessel is in the exclusive economic zone of [*insert name of licensing country*].

**(e) The operator of a foreign fishing vessel or his or her authorized agent, upon notification by the [insert name of licensing country, appropriate authority] that the vessel's ALC has failed to transmit, shall ensure that position reports are communicated to [insert name of authority delegated by the licensing country/appropriate authority] in the manner set out in ANNEX A.**

**(f) If it is not possible to make position reports, or if the [insert name of authority delegated by licensing country/appropriate authority] directs, the master of the vessel must immediately stow the fishing gear and take the vessel directly to a port as set out in ANNEX A.**

**COUNTRY NAME AND CREST**  
**COMMON REGIONAL FISHERIES LICENCE FORM**  
**FOREIGN VESSEL FISHING LICENCE**

Name of Licence Holder \_\_\_\_\_ Licence/Permit \_\_\_\_\_ Number \_\_\_\_\_

Address \_\_\_\_\_

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
Vessel Type \_\_\_\_\_  
Year Built \_\_\_\_\_

Licence Expiry date (dd/mm/yyyy) \_\_ / \_\_ / \_\_\_\_

The Licence Holder and the Vessel named below are hereby licensed in accordance with  
\_\_\_\_\_ (section and Act, agreement, regulations, etc) to fish in accordance with the terms and conditions set  
out in this licence and prescribed from time to time in  
\_\_\_\_\_ (Act, regulations, agreement, etc).

Name of Vessel \_\_\_\_\_ Size of vessel (Specify) \_\_\_\_\_  
\_\_\_\_\_ GRT (Other \_\_\_\_\_)

Country Registration Number \_\_\_\_\_ International Radio Call Sign \_\_\_\_\_

Regional Register Number \_\_\_\_\_ Authorised fishing method \_\_\_\_\_  
\_\_\_\_\_

Authorised Target Species \_\_\_\_\_  
\_\_\_\_\_

[Registration number and make of helicopter if any to be carried on  
vessel:

Registration number \_\_\_\_\_ Make \_\_\_\_\_

Registration number, make and name and address of operator of any  
aircraft used in association with fishing activities:

Registration number \_\_\_\_\_ Make \_\_\_\_\_

Name \_\_\_\_\_

Address \_\_\_\_\_ For and on behalf of the  
\_\_\_\_\_ Licensing Country  
\_\_\_\_\_  
\_\_\_\_\_

Vessels ALC\* Inmarsat C Mobile Number (IMN) \_\_\_\_\_

\* ALC must be of a type approved under FFA's "Certification Requirements for Automatic Location Communicators."

Alternate Vessel Contact Details

Inmarsat A No. \_\_\_\_\_

Inmarsat B No. \_\_\_\_\_

Inmarsat M No. \_\_\_\_\_

Mobile Ph No. \_\_\_\_\_

Telex No. \_\_\_\_\_

(Page 2 on reverse side of page 1 of ANNEX A)

## SUMMARY OF SELECTED LICENCE TERMS AND CONDITIONS

**1 The Master shall keep this licence (or a certified copy), together with any endorsement(s), on board at all times.**

2. Fishing is not permitted in designated closed areas.

3. The vessel shall clearly display, on both sides and the deck, its international radio call sign or the country (flag state) registration number.

4. The Master shall complete in English, daily, catch reports (logsheets) and submit them, along with true copies of the landing slips/dock receipts, to the issuing authority, a copy of preliminary logsheets to licensing Party(ies) not later than 14 days after completion of the trip with a submission of the final logsheet not later than 45 days after completion of the trip.

5. The Master shall provide 72 hours notice of a request to transship fish or re-provision the vessel. The vessel may only transship in an approved port and at a time and under such conditions as are specified by the issuing authority.

6. The Master shall allow any authorised and identified officer to board the vessel in the zone for the purpose of inspection and examination.

7. The Master and crew shall comply with the terms and conditions of any access agreement and all laws and regulations of the country.

**8 The operator of a foreign fishing vessel shall install, maintain and operate a registered ALC at all times and in accordance with the manufacturer's specifications and operating instructions and FFA standards.**

**9 The operator of a foreign fishing vessel shall ensure that no person tampers or interferes with the ALC and that the ALC is not altered, damaged or disabled.**

**10 The operator of a foreign fishing vessel shall ensure that the ALC is not moved from the agreed installed position or removed without the prior permission of the licensing authority.**

**11 The operator of a foreign fishing vessel shall ensure that the ALC is switched on and is operational at all times when the vessel is within the EEZ of the licensing country.**

12 The operator of a foreign fishing vessel or his or her authorised agent, upon notification by the licensing country/ appropriate authority that the vessel's ALC has failed to report, shall ensure that reports containing the vessel's name, call sign, position (expressed in Latitude and Longitude to minutes of arc), and date and time of the report, are communicated to *[insert delegated authority]* at intervals of 8 hours or such shorter period as specified by the delegated authority, commencing from the time of notification of the failure of the ALC. Such reports must continue until such time the ALC is confirmed operational by the licensing country/ appropriate authority.

13 If it is not possible to make any one or more of the further position reports as above, or when the delegated authority so directs, the master of the vessel must immediately stow the fishing gear and take the vessel directly to a port identified by the licensing country/appropriate authority, and as soon as possible, report to the delegated authority that the vessel is being, or has been, taken to port with gear stowed.

**FAILURE TO COMPLY WITH THESE AND OTHER TERMS AND CONDITIONS OF THE LICENCE, NATIONAL LAWS AND REGULATIONS MAY, IN ADDITION TO ANY JUDICIAL PENALTIES THAT MAY BE INCURRED, RESULT IN THE SUSPENSION OR LOSS OF THE LICENCE, EITHER TEMPORARILY OR PERMANENTLY.**

**ANNEX B**

**REPORTING DETAILS UNDER PARAGRAPH 5**

**(A) Weekly Reports**

- (i) report type (WEEK);
- (ii) date and time (GMT);
- (iii) vessel name; or
- (iv) international call sign or country (flag state) registration number; or
- (v) licence number;
- (vi) position (to one minute of arc);
- (vii) catch on board by weight by species;
- (viii) intended action.

as: WEEK/DDMMYY/TIME/VESSEL NAME/CALL SIGN/LICNO/LA 1111/LO11111/SJ xxx YF  
yyy OTH zzz/INTENDED ACTION

**(B) Zone Entry and Exit Reports**

- (i) report type (ZENT for entry and ZEXT for exit);
- (ii) data and time;
- (iii) vessel name; or
- (iv) international call sign or country (flag state) registration number; or
- (v) licence number;
- (vi) position (to one minute of arc);
- (vii) catch on board by weight by species;
- (viii) intended action

as: ZENT (or ZEXT) DDMMYY/TIME/VESSEL NAME/CALL SIGN/LIC NO/LA 111/LO  
11111/SJ xxx YF OTH zzz/INTENDED ACTION

**(C) Port Entry (including for unloading) Reports**

- (i) report type (PENT);
- (ii) date and time (GMT)
- (iii) vessel name; or
- (iv) international call sign or country (flag state) registration number; or
- (v) licence number;
- (vi) position (to one minute of arc);
- (vii) catch on board by weight by species;
- (viii) estimated time of entry into port (GMT)
- (ix) port name; and
- (x) intended action

as: PENT/DDMMYY/TIME/VESSEL NAME/CALL SIGN/LIC NO/LA 1111/LO 11111/SJ xxx YF  
yyy OTH zzz/PORT/ETA/INTENDED ACTION

**SUMMARY OF THE FAO  
STANDARD SPECIFICATIONS FOR THE  
MARKING AND IDENTIFICATION OF FISHING VESSELS**

**Introduction**

The specifications below were endorsed by the Eighteenth Session of the FAO Committee on Fisheries, Rome April 1989, for adoption by States as a standard system to identify fishing vessels operating, or likely to operate in waters of States other than those of the flag State.

**1. Basic System**

1.1 Vessels shall be marked with their International Telecommunications Union (ITU) Radio Call Signs (IRCS).

1.2 Vessels not provided with an IRCS shall be marked with the characters allocated by the ITU to the flag State and followed by the license or registration number assigned by the flag State. In such cases a hyphen shall separate the ITU characters and the assigned number.

1.3 Apart from the vessel's name or identification and port of registry the marking system specified shall be the only other vessel identification mark consisting of letters and numbers painted on the hull or superstructure.

**2. Application**

2.1 The markings shall be prominently displayed at all times:

- i) on the vessel's side or superstructure, port and starboard;
- ii) on a deck; Should an awning or other temporary cover obscure the mark, the awning or cover shall also be marked. Deck marks shall be placed athwartships with the top of the numbers or letters towards the bow.

2.2 Marks shall be placed as high as possible above the water line. The flare of the bow and the stern shall be avoided.

2.3 The marks shall:

- i) be placed so that they are not obscured by the fishing gear whether stowed or in use;
- ii) be clear of the flow from scuppers and overboard discharges including areas which might be damaged or discoloured from the catch of certain species;
- iii) not extend below the waterline.

2.4 Boats, skiffs and craft carried by the vessel for fishing operations shall bear the same mark as the vessel concerned.

**3. Technical Specifications**

3.1 Block lettering and numbering shall be used throughout.

3.2 The height (h) of the letters and numbers shall be in proportion to the size of the vessel in accordance with the following:

- i) for marks placed on the hull or superstructure:

Length of vessel overall (LOA) in meters	<u>Height of letters and numbers in</u>
<u>meters</u>	<u>(m) to be not less than</u>
(m)	
25m and over	1.0m
20m but less than 25m	0.8m

15m but less than 20m	0.6m
12m but less than 15m	0.4m
5m but less than 12m	0.3m
Under 5m	0.1m

- ii) for marks placed on deck: the height shall be not less than 0.3m for all classes of vessels of 5m and over.
- 3.3 The length of the hyphen shall be half the height of the letters and numbers.
- 3.4 The width of the stroke for all letters, numbers and the hyphen shall be  $h/6$ .
- 3.5 The space between letters and/or numbers shall not exceed  $h/4$  nor be less than  $h/6$
- 3.6 The space between adjacent letters having sloping sides shall not exceed  $h/8$  nor be less than  $h/10$ , for example A V.
- 3.7 The marks shall be:
  - i) white on a black background; or
  - ii) black on a white background.
- 3.8 The background shall extend to provide a boarder around the mark of not less than  $h/6$ .
- 3.9 The marks and background shall be maintained in good condition at all times

Attachment /Annex I

**COUNTRY NAME AND CREST**

**COMMON REGIONAL FISHERIES LICENCE FORM**

**FOREIGN VESSEL FISHING LICENCE**

Name of Licence Holder \_\_\_\_\_ Licence/Permit  
Number \_\_\_\_\_

Address \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
Vessel Type \_\_\_\_\_  
Year Built \_\_\_\_\_

Licence Expiry date (dd/mm/yyyy) \_\_ / \_\_ / \_\_

The Licence Holder and the Vessel named below are hereby licensed in  
accordance with \_\_\_\_\_

\_\_\_\_\_ (section and Act, agreement, regulations, etc)  
to fish in accordance with the terms and conditions set out in this licence  
and prescribed from time to time in  
\_\_\_\_\_ (Act, regulations, agreement, etc).

Name of Vessel \_\_\_\_\_ Size of vessel (Specify)  
\_\_\_\_\_ GRT (Other \_\_\_\_\_)

Country Registration Number \_\_\_\_\_ International Radio Call Sign  
\_\_\_\_\_

Regional Register Number \_\_\_\_\_ Authorised fishing method  
\_\_\_\_\_

Authorised Target Species  
\_\_\_\_\_

[Registration number and make of helicopter if any to be carried on  
vessel:

Registration number \_\_\_\_\_ Make \_\_\_\_\_

Registration number, make and name and address of operator of any  
aircraft used in association with fishing activities:

Registration number \_\_\_\_\_ Make \_\_\_\_\_

Name \_\_\_\_\_

Address \_\_\_\_\_ For and on behalf of the  
\_\_\_\_\_  
\_\_\_\_\_  
Licensing Country  
\_\_\_\_\_

### ***Hot Pursuit in International Law***

Hot pursuit has been defined as "the legitimate chase of a foreign vessel on the high seas following a violation of the law of the pursuing State committed by the vessel within the pursuing State's jurisdiction, provided that the chase commences immediately and the vessel evades visit and search within the jurisdiction, and provided the chase is carried on without interruption onto the high seas" 8

It is necessary to consider this definition in the light of the new law of the sea and relevant domestic law in order to determine how far it may be applied in each member country. It is hoped that some general principles will emerge from such a discussion from which regional policy guidelines could be developed.

#### **The position in international law**

The doctrine of hot pursuit in international law is not new. Indeed, the right of pursuit from the territorial sea onto the high seas was already well established in the nineteenth century. It would seem that the origin of the doctrine lies in Anglo-Saxon common law, which held that for jurisdictional purposes an arrest made after pursuit was deemed to have been made at the place where the pursuit commenced. The rationale behind the doctrine has been explained thus:

*"...When a vessel, or someone on board her, while within foreign territory commits an infraction of its laws she may be pursued into the open seas, and there arrested. It must be added that this can only be done when the pursuit is commenced while the vessel is still within the territorial waters or has only just escaped from them. The reason for the permission seems to be that pursuit under these circumstances is a continuation of an act of jurisdiction which has been begun within the territory itself, and that it is necessary to permit it in order to enable the territorial jurisdiction to be efficiently exercised."* 9

#### **2. The Geneva Convention on the High Seas. 1958**

The doctrine was codified in Article 23 of the Geneva Convention on the High Seas of 1958. 10 Article 23 (which is set out in full in Annex 1) introduced a number of qualifications to the doctrine which had not previously been expressed in State practice. These were as follows -

- there must be 'good reason' to believe that the vessel has violated the law of the pursuing State;
- it is not necessary that the vessel giving the order to stop should be within the territorial sea or contiguous zone;
- the pursuing vessel must satisfy itself, by such practicable means as may be available, that the ship pursued, or one of its boats or other craft working as a team, and using the ship pursued as
  - a mother ship, are within the limits of the territorial sea or contiguous zone;
- the pursuit may only be commenced after a visual or auditory signal to stop has been given.

The main difficulty with Article 23 is that it leaves largely unresolved the question of where the offence for which the foreign vessel is pursued must be committed. While it is clear that pursuit may begin from the territorial sea for all offences committed within the territorial sea, it is by no means certain what, if any, offences committed in the contiguous zone entitle the coastal State to commence hot pursuit. The coastal State exercises control over the contiguous zone only to prevent infringement of its customs, fiscal, immigration and sanitary regulations within the territorial sea and to punish violations of such regulations committed within its territory or territorial sea. 11 It has been convincingly argued that this 'control' does not amount to a 'right' to enforce the laws of the coastal State in the contiguous zone, and thus hot pursuit may only begin in the contiguous zone in respect of a violation of the coastal State's law

which occurred in the territorial sea. However, other writers have argued that hot pursuit and arrest may relate to acts committed within the contiguous zone.

### 3. The United Nations Convention on the Law of the Sea. 1982

The United Nations Convention on the Law of the Sea<sup>⊗</sup> attempted in Article 111 to resolve the problems of jurisdiction which had arisen in connection with Article 23. Although the provisions of Article 111 (which are set out in full in Annex 2) are similar to those in Article 23, the most significant new element is that it is clearly stated that the right of hot pursuit applies to violations in the EEZ or on the continental shelf. Thus it may be said that the LOSC would permit hot pursuit to begin in the EEZ or on the continental shelf in respect of an offence committed therein which is directly related to the regime of those zones (ie., in the case of the EEZ, an offence which relates to the matters under the exclusive jurisdiction of the coastal State as set out in Article 56 of the LOSC).

The difficulty which faces member countries is that it is by no means certain that the provisions of Article 111 in respect of the EEZ reflect customary international law. Certainly, the provisions of HSC, art.23 are generally accepted as representing customary international law. It must be remembered that LOSC is in force and half of FFA member States in the region<sup>⊕</sup> are not parties to the Convention.

Consequently, there may be some doubt as to whether the right to pursue vessels beyond the EEZ for violations which took place within the EEZ exists in customary international law, though the position taken by a number of FFA member States is that such a right clearly does exist. For example, in the 'Jeannette Diana' case in Solomon Islands, the 'Jeannette Diana' was pursued and arrested for an offence that was committed well outside the territorial sea and contiguous zone. During the subsequent trial, the defence did not even raise the issue of the pursuit and arrest being contrary to international law.

Given that the fisheries aspects of the EEZ provisions in the LOSC have arguably already become part of customary international law, it may well be argued that the right of hot pursuit from the EEZ in respect of an offence committed within the EEZ has also acquired the status of a rule of customary international law. In any event, the opportunity exists to adopt a regional policy on the interpretation

of the rules of international law, and this could only have the effect of enhancing existing State practice within the regional and international arena.

### 4. Extent of the right of hot pursuit

Hot pursuit may be continued indefinitely so long as it maintains the character of 'hot' pursuit and is on the high seas. Article 111 specifically terminates the right of hot pursuit only when the vessel being pursued enters the territorial sea of its own or another State. For the purposes of Article 111, hot pursuit may be continued into the contiguous zone, fishery zones or EEZ of another State.

### 5. The nature of hot pursuit

The right of hot pursuit may only be exercised by warships or military aircraft, or other ships and aircraft clearly marked and identifiable as being on government service and authorised to that effect.<sup>⊘</sup> The pursuing vessel must have good reason to believe that the ship has violated the laws and regulations of the coastal State, and must give a visual or auditory signal to stop at a distance which enables it to be seen or heard by the foreign ship. These would appear to be objective, rather than subjective, tests.

Hot pursuit terminates when it is interrupted. The LOSC does not expressly deal with the situation where pursuit is undertaken by ships in relay, though it does permit a ship or aircraft to take over from an aircraft which began the pursuit.<sup>⊙</sup> In practice, it would seem that international opinion allows ships and aircraft in any combination to engage in hot pursuit by relay.

### 6. Constructive presence

Both Article 23 and Article 111 give recognition to the doctrine of constructive presence. This implies that a vessel may be pursued even if it is not within the relevant jurisdictional zone, providing one or more of its boats or other craft was within the relevant zone. In these circumstances the pursuer must satisfy itself that the vessel pursued or one of its boats, or other craft working as a team and using the

vessel pursued as a mother ship, was within the relevant zone.⊂ It should be noted that a mere sighting by an aircraft is not sufficient to initiate hot pursuit, unless the sighting is accompanied by an order to stop.

Footnotes:

ℵ. O'Connell, The International Law of the Sea: Clarendon Press, 1984

ℑ. Hall, International Law, (1880), p309

℞. Hereinafter referred to as HSC

∅. HSC, art. 24, LOSC, art. 33

⊗. Hereinafter referred to as LOSC

⊕. With the exceptions of Fiji, the Federated States of Micronesia, Marshall Islands, Australia, Nauru, Cook Islands, Tonga and Western Samoa.

∅. LOSC, art. 111(5)

∩. LOSC, art. 111(6)(b)

⊂. LOSC, art. 111(4)

## THE GENEVA CONVENTION ON THE HIGH SEAS, 1958

### Article 23

1. The hot pursuit of a foreign ship may be undertaken when the competent authorities of the coastal State have good reason to believe that the ship has violated the laws and regulations of that State. Such pursuit must be commenced when the foreign ship or one of its boats is within the internal waters or the territorial sea or the contiguous zone of the pursuing State, and may only be continued outside the territorial sea or the contiguous zone if the pursuit has not been interrupted. It is not necessary that, at the time when the foreign ship within the territorial sea or the contiguous zone receives the order to stop, the ship giving the order should likewise be within the territorial sea or the contiguous zone. If the foreign ship is within a contiguous zone, as defined in Article 24 of the Convention on the Territorial Sea and the Contiguous Zone, the pursuit may only be undertaken if there has been a violation of the rights for the protection of which the zone was established.

2. The right of hot pursuit ceases as soon as the ship pursued enters the territorial sea of its own country or of a third State.

3. Hot pursuit is not deemed to have begun unless the pursuing ship has satisfied itself by such practicable means as may be available that the ship pursued or one of its boats or other craft working as a team and using the ship pursued as a mother ship are within the limits of the territorial sea, or as the case may be, within the contiguous zone. The pursuit may only be commenced after a visual or auditory signal to stop has been given at a distance which enables it to be seen or heard by the foreign ship.

4. The right of hot pursuit may be exercised only by warships or military aircraft, or other ships or aircraft on government service specially authorized to that effect.

5. Where hot pursuit is effected by an aircraft:

(a) The provisions of paragraphs 1 to 3 of this article shall apply *mutatis mutandis*;

(b) The aircraft giving the order to stop must itself actively pursue the ship until a ship or aircraft of the coastal State, summoned by the aircraft, arrives to take over the pursuit, unless the aircraft is itself able to arrest the ship. It does not suffice to justify an arrest on the high seas that the ship was merely sighted by the aircraft as an offender or suspected offender, if it was not both ordered to stop and pursued by the aircraft itself or other aircraft or ships which continue the pursuit without interruption.

6. The release of a ship arrested within the jurisdiction of a State and escorted to a port of that State for the purposes of an inquiry before the competent authorities may not be claimed solely on the ground that the ship, in the course of its voyage, was escorted across a portion of the high seas, if the circumstances rendered this necessary.

7. Where a ship has been stopped or arrested on the high seas in circumstances which do not justify the exercise of the rights of hot pursuit, it shall be compensated for any loss or damage that may have been thereby sustained.

**UNITED NATIONS CONVENTION ON THE LAW OF THE SEA, 1982**

**Article 111**

*Right of hot pursuit*

1. The hot pursuit of a foreign ship may be undertaken when the competent authorities of the coastal State have good reason to believe that the ship has violated the laws and regulations of that State. Such pursuit must be commenced when the foreign ship or one of its boats is within the internal waters, the archipelagic waters, the territorial seas or the contiguous zone of the pursuing State, and may only be continued outside the territorial sea or the contiguous zone if the pursuit has not been interrupted. It is not necessary that, at the time when the foreign ship within the territorial sea or the contiguous zone receives the order to stop, the ship giving the order should likewise be within the territorial sea or the contiguous zone. If the foreign ship is within a contiguous zone, as defined in article 33, the pursuit may only be undertaken if there has been a violation of the right for the protection of which the zone was established.

2. The right of hot pursuit shall apply *mutatis mutandis* to violations in the exclusive economic zone or on the continental shelf, including safety zones around continental shelf installations, of the laws and regulations of the coastal State applicable in accordance with this Convention to the exclusive economic zone or the continental shelf, including such safety zones.

3. The right of hot pursuit ceases as soon as the ship pursued enters the territorial sea of its own State or of a third State.

4. Hot pursuit is not deemed to have begun unless the pursuing ship has satisfied itself by such practicable means as may be available that the ship pursued or one of its boats or other craft working as a team and using the ship pursued as a mother ship is within the limits of the territorial sea, or, as the case may be, within the contiguous zone or the exclusive economic zone or above the continental shelf. The pursuit may only be commenced after a visual or auditory signal to stop has been given at a distance which enables it to be seen or heard by the foreign ship.

5. The right of hot pursuit may be exercised only by warships or military aircraft, or other ships or aircraft, clearly marked and identifiable as being on government service and authorized to that effect.

6. Where hot pursuit is effected by an aircraft:

a) the provisions of paragraphs 1 to 4 shall apply *mutatis mutandis*,

b) the aircraft giving the order to stop must itself actively pursue the ship until a ship or another aircraft of the coastal State, summoned by the aircraft, arrives to take over the pursuit, unless the aircraft is itself able to arrest the ship. It does not suffice to justify an arrest outside the territorial sea that the ship was merely sighted by the aircraft as an offender or suspected offender, if it was not both ordered to stop and pursued by the aircraft itself or other aircraft or ships which continue that pursuit without interruption.

7. The release of a ship arrested within the jurisdiction of a State and escorted to a port of that State for the purpose of an inquiry before the competent authorities may not be claimed solely on the ground that the ship, in the course of its voyage, was escorted across a portion of the exclusive economic zone or the high seas, if the circumstances rendered this necessary.

8. Where a ship has been stopped or arrested outside the territorial sea in circumstances which do not justify the exercise of the right of hot pursuit, it shall be compensated for any loss or damage that may have been thereby sustained.

Attachment D

**PRO-FORMA SUBSIDIARY AGREEMENT TO IMPLEMENT THE NIUE TREATY  
ON COOPERATION IN FISHERIES SURVEILLANCE AND LAW  
ENFORCEMENT IN THE SOUTH PACIFIC REGION**

The Governments of the States party to this Agreement:

BEING PARTIES to the Niue Treaty on Cooperation in Fisheries Surveillance and Law Enforcement in the South Pacific Region 1992;

WISHING to enhance further their ability to enforce effectively their fisheries laws, deter breaches of such laws, and to cooperate closely with each other for that purpose;

RECOGNISING that it is open to a party to permit another party to conduct fisheries surveillance and enforcement operations in its waters subject to such terms and conditions as may be agreed;

HAVE AGREED AS FOLLOWS:

**ARTICLE 1 - DEFINITIONS**

1.1 In this Agreement, words have the same meaning as in the Treaty unless otherwise defined in this Agreement.

1.2 In this Agreement:

(a) “operation” means a fisheries surveillance and enforcement activity undertaken for a specific period of time or to achieve a specific objective agreed by the parties;

(b) “party” means a State which is a party to this Agreement;

(c) “this Agreement” includes Annexes to this Agreement;

(d) “Treaty” means the Niue Treaty on Cooperation in Fisheries Surveillance and Law Enforcement in the South Pacific Region, done at Honiara on July 9, 1992; and

(e) “waters” means the exclusive economic zone, territorial sea and archipelagic waters of [Country A].

**ARTICLE 2 - AUTHORITY**

2.1 Subject to the terms of this Agreement and the applicable laws of [Country A], [Country A] authorises [class of officers] of [Country B] for the purposes of fisheries surveillance and enforcement under the [applicable Fisheries Act of Country A] in respect of the activities of foreign fishing vessels in [Country A].

2.2 Persons authorised under Clause 2.1 shall not exercise powers other than in accordance with the provisions of this Agreement.

2.3 The parties shall inform each other of the National Authority responsible for the co-ordination and implementation of this Agreement.

2.4 Before commencing each operation, [Country A] shall notify the Commanding Officer of the vessel or aircraft of the point and means of contact while in [Country A's] waters.

2.5 The parties shall agree in writing, using accepted diplomatic channels, upon the dates on which a scheduled operation is planned to commence and conclude.

2.6 [Country A] may request [Country B] in writing to undertake an unscheduled operation at any time.

2.7 The National Authority of [Country B] shall advise the National Authority of [Country A] when a scheduled or an unscheduled operation has actually commenced and concluded, and these dates shall be the actual period of the operation.

### **ARTICLE 3 - USE OF ASSETS AND PERSONNEL**

3.1 [Country B] shall make available to [Country A] the assets identified in Annex I for the purposes of the fisheries surveillance and enforcement objectives of [Country A] in accordance with the terms and conditions of this Agreement and shall ensure that all vessels and aircraft are marked with the identifications set out in Annex II and are fit for their intended purpose.

3.2 The ownership, command and control of assets and the command of personnel made available under this Agreement shall always remain with [Country B] but the National Authority of [Country A] identified under Clause 2.3 of this Agreement may exercise day to day direction of the assets and personnel.

3.3 Before the commencement of an operation under this Agreement the parties shall agree to the scope of the fisheries surveillance and enforcement objectives for the operation.

3.4 [Country A] shall designate in writing those officers nominated by [Country B] whom it authorises to perform operations on behalf of [Country A].

3.5 [Country A] shall designate in writing those of its officers who are authorised to go aboard [Country B's] vessels or aircraft to perform operations at such times and places and in such manner as the parties agree *where such duties do not contravene the laws of [Country B]. Officers from [Country A] while on board a vessel or aircraft of [Country B] shall obey the lawful orders of the Commanding Officer of the vessel or aircraft.*

3.6 Officers designated under Clauses 3.4 and 3.5 shall carry an identity card in the form set out in Annex III.

3.7 [Country B] will advise [Country A] of any circumstances, as they arise, which may prejudice the effective use of the assets and personnel provided under this Agreement. The parties agree to consult on actions to be taken as a consequence of such circumstances. In the event that there is an inability to reach agreement either party has the right to cancel the operation.

3.8 [Country A] shall grant *diplomatic* clearance for the assets of [Country B] provided under this Agreement to meet fisheries surveillance and law enforcement needs arising for the duration of the specified operation.

3.9 The procedures for the conduct of an operation are set forth in Annex IV and the parties agree to ensure that their personnel comply with the procedures.

3.10 [Country A] shall provide to [Country B] copies of legislation governing the conduct of fisheries surveillance and enforcement activities within [Country A's] waters together with the delimiting co-ordinates of those waters and [Country B] shall ensure that its personnel comply with the legislation *provided that such compliance does not contravene the laws of [Country B].*

### **ARTICLE 4 - HOT PURSUIT**

*The parties agree that the continuation of hot pursuit of a foreign fishing vessel into each other's territorial sea and archipelagic waters is permitted.*

#### **ARTICLE 5 - EXTRADITION OF OFFENDERS**

*Either party may in the event of the other party holding a person or any asset (including a foreign fishing vessel) in its custody for an offence against its laws request the holding party to assist the requesting party in enforcing its fisheries laws in respect of that person or asset. The holding party shall provide such assistance upon completion of its legal processes and to the extent permitted by its national laws and regulations. Such assistance shall be provided on such conditions as to cost recovery or other matters as the parties agree in each case.*

#### **ARTICLE 6 - INDEMNITY**

[Country A] shall indemnify [Country B] from liability in respect of any act done, or omitted to be done, by any member of the crew of the vessel or aircraft in the execution or the purported execution of their duties under this Agreement. This indemnity shall not apply where the liability arises from the negligence or misconduct of any member of the crew of the vessel or aircraft.

#### **ARTICLE 7 - COSTS AND PROVISIONS**

7.1 *The costs of each operation undertaken pursuant to this Agreement shall be met by the party in whose waters the operation is carried out in accordance with the provisions of this Article.*

7.2 *Before the commencement of each operation [Country A] will advance to [Country B] a sum to be notified by [Country B], estimated to be sufficient to cover -*

- (a) crew allowances for the duration of the operation and the standard rate paid by the [Country B]; and*
- (b) provisions and victuals including fuel and other consumables sufficient for the duration of the operation.*

7.3 *Before the commencement of each operation [Country B] will equip the vessel or aircraft with a full load of fuel.*

7.4 *The following will be provided by [Country A] at no expense to [Country B]:*

- (a) additional victuals, provisions and supplies as may be required during each patrol;*
- (b) berthing facilities;*
- (c) maintenance and slipway facilities as required, including materials and labour, to the extent that such facilities are available in [Country A]. In the event that it is necessary to bring in spare parts from overseas the freight costs arising shall be met by [Country A] free of duty. All other repair and maintenance costs will be met by [Country B]. [Country A] shall allow all spare parts to be imported free of duty.*

7.5 *Within two weeks of the end of each operation [Country B] shall provide [Country A] with a detailed statement of expenditure relating to the operation. [Country A] shall reimburse [Country B] for the following expenses -*

- (a) *the actual costs of crew allowances, fuel, provisions and victuals for the duration of the operation paid or supplied by [Country B] less the sum advanced under paragraph 2 of this Article;*
- (b) *the cost of fuel supplied under paragraph 3 of this Article;*
- (c) *the cost of refuelling the vessel upon its return to the home port of [Country B] at the end of the patrol; and*
- (d) *any additional expenses necessarily incurred by [Country B] in carrying out the terms of this Agreement.*

## **ARTICLE 8 - INVESTIGATIONS**

8.1 In the event that, during an operation, the vessel or aircraft exercises powers to direct or bring the foreign fishing vessel to port for further investigation, the vessel shall be directed or brought to the nearest port where the National Authority of [Country A] will assume responsibility for the fishing vessel and its crew.

8.2 The Commanding Officer and crew of the vessel or aircraft shall cooperate fully with the authorities of [Country A] in the investigation of any alleged offences involving a foreign fishing vessel in [Country A's] waters and in the subsequent preparation of any evidence required for the trial of those offences.

8.3 In the event that any member of the crew of the vessel or aircraft is required to give evidence in a court in [Country A] in connection with any trial of any offence involving a foreign fishing vessel in [Country A's] waters during the course of an operation, the costs of the attendance of such member of the crew, including reasonable travel expenses and allowances, shall be met in full by [Country A].

## **ARTICLE 9 - CONSULTATIONS, DISPUTE SETTLEMENT AND AMENDMENT**

9.1 Any dispute arising out of the interpretation or implementation of this Agreement will be settled through consultation and negotiations.

9.2 At the request of either party, consultations on any matter arising out of or in connection with the implementation of this Agreement shall be held within [ ] days of the date of the request.

9.3 Either party may propose an amendment to this Agreement. Amendments shall be considered in the course of any consultation which takes place pursuant to Clause 9.2. Amendments shall only be effective with the mutual agreement of the parties and shall be recorded in writing.

## **ARTICLE 10 - TERMINATION**

This Agreement may be terminated by either party giving the other party [ ] months written notice.

## **ARTICLE 11 - ENTRY INTO FORCE**

This Agreement will enter into force immediately upon signature by both parties and will remain in force for a period of [ ] years from the date of signature.

[Execution Clause]

ANNEX I

[Assets to be made available]

ANNEX II

[Vessel and aircraft identification markings]

ANNEX III

[Form of identity card]

ANNEX IV

[Procedures for conduct of an operation]

**Attachment D**

**PRO-FORMA SUBSIDIARY AGREEMENT TO IMPLEMENT THE NIUE TREATY ON  
COOPERATION IN FISHERIES SURVEILLANCE AND LAW ENFORCEMENT IN THE  
SOUTH PACIFIC REGION**

**Notes for Guidance**

**General**

These notes are published for the guidance of countries negotiating subsidiary Agreements using the attached “Pro-forma Agreement”. The notes do not constitute part of the Agreement. It is recommended that the following matters be carefully considered:

- (a) national laws of each country with reference in particular to
  - power to authorise foreign nationals under the relevant fisheries legislation
  - definition of a ‘locally based foreign fishing vessel’.

(b) whether Agreements are to be reciprocal; if reciprocity is desired two separate Agreements will need to be signed. The “Pro-forma” is designed so that “Country A” is the provider of services and facilities and “Country B” is the recipient of them.

(c) those sections in italics are recommended as optional and may or may not be included to suit individual circumstances

**Article 2**

Clause 2.1 is the fundamental operational provision of the Agreement. Formal authorisation pursuant to the relevant fisheries legislation is still required. The clause provides that powers available to authorised persons are limited to the investigation of foreign fisheries vessels within the meaning of the fisheries legislation. Individual countries will need to check that authorisation of foreign nationals as contemplated by this clause under domestic fisheries legislation.

Clause 2.2 provides that the exercise of any powers given by the authorisation is limited as set out in the Agreement.

Clause 2.3 is designed to ensure proper accountability is established for the implementation of the Agreement.

**Article 3**

This Article provides the detailed arrangements for the enabling the conduct of particular operations.

Clause 3.1 permits the specification of the items that will be used in any operation and requires the items to be listed in Annex I. It is recommended that the list of items in that Annex be as general as possible and that it sets out types of items rather than as specified items.

Clause 3.2 makes clear that ownership and command of any assets remain with the country providing them.

**Article 4**

This Article is an addition to the right of hot pursuit recognised at international law. If incorporated, it permits hot pursuit to continue beyond the exclusive economic zone into the territorial sea and archipelagic waters of each country. It may be appropriate to deal with this Article by way of a separate specific Agreement.

## **Article 6**

This Article, as presently drafted, is intended to be limited to acts or omissions which give rise to claims or suits from owners, operators or the crew of boarded foreign fishing vessels. Countries may wish to consider what, if any, insurance arrangements need to be made in respect of the possibility of loss of or damage to an asset, or the loss of life or injury to personnel occurring during the course of any operation.

## **Article 7**

Countries may agree to undertake operations on a mutual basis without seeking reimbursement of costs. A particular Agreement may enable operations to be at no cost, even though these are not mutual Agreements. Countries will need clearly to specify in advance of any operation the basis for each item's costing. The list of costed items appearing in this Article is not intended to be exhaustive. It is indicative of the major items recommended for consideration but may have other items added to it as agreed.

## **Annexes**

Annex I: comprises assets to be made available (see note to Clause 3.1).

Annex II: vessel and aircraft identification markings. This Annex should be reproduced from Annex 1 of the Niue Treaty.

Annex III: form of identity card. This should be reproduced from Annex 2 of the Niue Treaty.

Annex IV: procedures for the conduct of an operation. It is recommended that this Annex contain a comprehensive list of procedures some only of which may be relevant for any particular operation.